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In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

SIOUX NATION OF INDIANS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

WILLIAM ALSUP
Assistant to the Solicitor General

DIRK D. SNEL
MARTIN W. MATZEN
Attorneys
Department of Justice
Washington, D.C. 20530

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OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. 1a-70a) is reported at 601 F.2d 1157. The opinion of the Indian Claims Commission (A. 264-315) is reported at 33 Ind. Cl. Comm. 151.

JURISDICTION

The opinion of the Court of Claims, determining liability against the United States, was filed on June 13, 1979 (Pet. App. 1a-70a). On July 31, 1979, a

final judgment against the United States was entered (Pet. App. 71a-73a). On September 11, 1979, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including October 29, 1979. The petition was filed on October 17, 1979, and granted by this Court on December 10, 1979 (A. 349). The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether legislation which divests an Indian tribe of a portion of its lands in consideration of an undertaking to provide material assistance and food rations until the Indians are able to support themselves is a "taking" under the Just Compensation Clause of the Fifth Amendment so as to entitle the tribe to interest on a later award for the value of the lands.

STATUTES AND TREATIES INVOLVED

The Act of February 28, 1877, ch. 72, 19 Stat. 254, set forth in full at pages 331-346 of the Appendix, provides in pertinent part:

> That a certain agreement * * * is hereby ratified and confirmed * * *.
>
> *Article 1.* The said parties hereby agree that the northern and western boundaries of the reservation defined by article 2 of the treaty between the United States and different tribes of Sioux Indians, concluded April 29, 1868, and proclaimed February 24, 1869, shall be as follows * * * and the said Indians do hereby relinquish and cede to the United States all the

> territory lying outside the said reservation, as herein modified and described, including all privileges of hunting; and article 16 of said treaty is hereby abrogated.
>
> * * * * *
>
> *Article 5.* In consideration of the foregoing cession of territory and rights, and upon full compliance with each and every obligation assumed by the said Indians, the United States does agree to provide all necessary aid to assist the said Indians in the work of civilization; to furnish to them schools and instruction in mechanical and agricultural arts, as provided for by the treaty of 1868. Also to provide the said Indians with subsistence consisting of a ration for each individual * * *. Such rations, or so much thereof as may be necessary, shall be continued until the Indians are able to support themselves. * * * The Government will aid said Indians as far as possible in finding a market for their surplus productions, and in finding employment, and will purchase such surplus, as far as may be required, for supplying food to those Indians, parties to this agreement, who are unable to sustain themselves; and will also employ Indians, so far as practicable, in the performance of Government work upon their reservation.
>
> * * * * *

The Treaty of April 29, 1868, 15 Stat. 635, and pertinent provisions of the Act of August 15, 1876, ch. 289, 19 Stat. 176, are set forth in the Appendix (A. 317-330).

STATEMENT

As this case returns to the Court, the only question is whether the Sioux Nation is entitled to interest since 1877 on an award of some $17 million, representing the value of the Black Hills severed from the Great Sioux Reservation in that year. There is no dispute as to valuation, or as to offsets. Nor does the United States contest the award of $17 million. What is more, it is common ground that the interest issue turns entirely upon whether the severance of the Black Hills in 1877 constituted a "taking" by the United States within the scope of the Just Compensation Clause of the Fifth Amendment. It does not follow, however, that the factual setting of the controversy can be stated shortly. In our view, at least, it is necessary to retrace in some detail the historical events that led to the removal of the Black Hills from the Sioux Reservation and briefly to describe the judicial proceedings that preceded the present suit.

A. Historical Background

1. *The Fort Laramie Treaty of 1851*

At the time of the Louisiana Purchase in 1803, the various bands of the Sioux Indians occupied, with other tribes, a large area of land in the territory now comprising the States of Minnesota, Iowa, South Dakota, North Dakota, Nebraska, Wyoming and Montana, and, of this area, the mountainous region now known as the Black Hills in South Dakota, was a part (A. 202). The discovery of gold in California in 1848 resulted in a tide of emigration, some of

which passed through Wyoming and Nebraska where several bands of the Sioux and other Indians lived, roamed, and hunted. This provoked the Treaty of September 17, 1851, 11 Stat. 749. Article 5 of this treaty recognized a defined territory as exclusively belonging to each nation. The Sioux territory comprised South Dakota and parts of what is now Nebraska, Wyoming, North Dakota and Montana (A. 202-204). See also 2 Ind. Cl. Comm. 646 (1954).

2. *The Treaty of 1868*

The discovery of gold in Montana in 1861 resulted in a further tide of white emigration through the territory occupied by the Sioux Indians, as described in the 1851 treaty (A. 205). This line of travel was northward from the California Trail, near old Fort Laramie, Wyoming, along the valley of the Powder River, to and across the Yellowstone River and westward into the gold fields of Montana (*ibid.*). Disputes and conflicts arose with the Indians over this route on account of the large number of white travelers passing along it, and between 1861 and 1867, there were a number of military engagements between the Government and the Sioux Indians culminating in the so-called Powder River War of 1866-1867 (*ibid.*). Following the Powder River War, the United States and the various bands of the Sioux Indian Tribe concluded a treaty on April 29, 1868, which was ratified February 16, 1869, and proclaimed February 24, 1869 (15 Stat. 635, 640).[1]

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[1] This treaty was negotiated, made, and ratified pursuant to the Act of Congress of July 20, 1867, ch. 32, 15 Stat. 17. Sec-

Two aspects of the treaty are at the root of this case. One was the solemn promise of the United States to respect the territorial integrity of the Great

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tion 2 of the Act directed the negotiating commission "to examine and select a district or districts of country having sufficient area to receive all the Indian tribes now occupying territory east of the Rocky Mountains, not now peacefully residing on permanent reservations under treaty stipulations, to which the government has the right of occupation or to which said commissioners can obtain the right of occupation, and in which district or districts there shall be sufficient tillable or grazing land to enable the said tribes, respectively, to support themselves by agricultural and pastoral pursuits. Said district or districts, when so selected, and the selection approved by Congress, shall be and remain permanent homes for said Indians to be located thereon, and no person(s) not members of said tribes shall ever be permitted to enter thereon without the permission of the tribes interested, except officers and employees of the United States: Provided, That the district or districts shall be so located as not to interfere with travel on highways located by authority of the United States, nor with the route of the Northern Pacific Railroad, the Union Pacific Railroad, the Union Pacific Railroad Eastern Division, or the proposed route of the Atlantic and Pacific Railroad by the way of Albuquerque." 15 Stat. 17.

In the fall of 1867, the treaty commissioners submitted a proposed treaty to a large number of the leaders and members of the Sioux Indians at Fort Laramie (A. 206). The negotiations between the commissioners and the leaders and members of the various bands of the Sioux Tribe of Indians continued in the spring of 1868 (*ibid.*). Upon the insistence of the Indians certain concessions were made by the commissioners representing the United States (*ibid.*). As a result the treaty was signed by the portion of the Sioux chiefs, leaders, and members of the tribe at Fort Laramie on April 29, 1868, and the treaty was subsequently agreed to at various following dates by Sioux chiefs, leaders, and members of all the remaining bands of the Sioux Tribe (A. 206-207).

Sioux Reservation established by the treaty. Article II of the treaty set aside "for the absolute and undisturbed use and occupation of the Indians" the Great Sioux Reservation located in what is now the entire state of South Dakota west of the Missouri River, including the Black Hills (A. 207-208). The United States agreed that no unauthorized persons "shall ever be permitted to pass over, settle upon, or reside in [that] territory" (*ibid.*). Article XII provided that no further cession of any reservation lands of the Sioux "shall be of any validity or force" unless executed and signed by at least three-fourths of the adult male Indians occupying or interested in those lands (A. 210).[2]

Second, the treaty contemplated that the Sioux would become self-supporting on the reservation before the expiration of the assistance required by the treaty to be rendered by the Government. Thus, in Articles VII and VIII the United States agreed to equip the Sioux who settled on the reservation for farming and to furnish them needed facilities and assistance in that connection, to furnish them educational facilities for not less than 20 years, and for a period of 30 years to furnish each Indian with articles of clothing, etc., and to pay the sum of ten dollars for each Indian "while such persons roam and hunt," and twenty dollars "for each person who en-

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[2] In Articles XI, XV, and XVI the Sioux were also given the right to hunt on certain lands in Nebraska north of the Platte River and in the Powder River areas (A. 209-210).

gages in farming" to be used for the purchase of such articles as from time to time the conditions and necessities of the Indians might indicate to be proper (A. 321-322). In addition to all the other provisions of the treaty, the United States agreed, in Article X, to appropriate and expend annually such sum as might be necessary for the subsistence of the Indians of the Sioux Tribe on the reservation for a period of four years (A. 323).[3]

3. *The Failure Of The Sioux To Achieve Self-Sufficiency*

Pursuant to the requirement of Article X to supply subsistence rations to the reservation Sioux until 1873, Congress appropriated more than $5 million in subsistence rations between 1868-1872. The last such appropriation was made on February 14, 1873, for the fiscal year ending June 30, 1874. 17 Stat. 437, 456. The Sioux, however, had clearly not become self-supporting (A. 140-141, 151, 237). It is undisputed that Congress was under no treaty or other obligation to provide subsistence to the Sioux after June 30, 1874. Nonetheless, in each of the two following years, $1.1 million or more was gratuitously appropriated for their subsistence (Pet. App. 6a). The Sioux were, by virtue of their failure to achieve self-sufficiency, dependent on these rations (A. 45, 140, 141, 151, 237). The failure of the Sioux to achieve self-sufficiency, their desperate need for some

[3] In a separate proceeding, the Indian Claims Commission awarded the Sioux Nation $43.9 million for the cession of lands effected by the 1868 treaty. 42 Ind. Cl. Comm. 214, 257 (1978). That decision is now on appeal to the Court of Claims.

guaranteed means of survival, and a plan calculated to lead to economic independence were difficulties that the 1877 legislation at issue in this case sought to solve.

4. *Efforts To Prevent Illegal Entries By Miners Into The Black Hills*

The Black Hills "rise like an island from an ocean of grass-covered and treeless plains" in the southwest corner of South Dakota between the north and south forks of the Cheyenne River (A. 155, 224). One of the major factors that eventually persuaded Congress to remove the Black Hills from the reservation was the ever increasing difficulty, even with the use of military force, in preventing that area from being overrun by prospectors in search of gold in violation of Article II of the 1868 treaty.

Well before the 1868 treaty, gold had been found by whites in the Black Hills (A. 308).[4] In the sum-

[4] There is evidence that mining and trapping parties entered the Black Hills area as early as the 1830's and 1840's. During the early 1850's, prospecting parties enroute to California mined in the Black Hills and recovered gold. In 1857 Lt. G. K. Warren, a topographical engineer, led a reconnassiance expedition into Sioux country. In the Black Hills area, Lt. Warren discovered gold. In his report he also noted that the area was watered by beautiful flowing streams, and that it contained rich valleys capable of cultivation and ample timber and other building materials. 33 Ind. Cl. Comm. 151, 245-246 (1974). During 1865 a military expedition enroute to the Powder River area passed through the northern Black Hills. Many specimens of gold-bearing quartz were discovered. In 1866, Dr. Ferdinand V. Hayden led a scientific expedition into the hills. Dr. Hayden reported that it could be found "in almost every stream." *Id.* at 247.

mer of 1874, an expedition commanded by Lt. Col. Custer explored the Black Hills and confirmed the presence there of gold in paying quantities (A. 14-19, 82-93).[5] Reports of this discovery, coupled with knowledge of the other resources of the Black Hills and their ready accessibility to whites,[6] produced a massive influx of prospectors, miners and settlers who entered the area without the consent of the Sioux or the United States (Pet. App. 6a; A. 211).

Although the 1868 treaty provided that no one other than the Sioux and designated officers of the government would be "permitted" in the reservation (A. 208), the treaty did not describe the degree of military force that the United States was required to use to prevent violations of the treaty. Nonetheless, for nearly a decade the United States increasingly

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[5] The Custer expedition entered the Black Hills, among other reasons, to locate suitable sites for military posts to assist in preventing depredations by the hostile bands of the Sioux who travelled through the Black Hills to attack friendly settlements (A. 15, 21). This expedition was, in the view of the Acting Secretary of the Interior, permitted by the 1868 treaty (A. 20, 65). A report made by Custer on the expedition appears at S. Exec. Doc. No. 32, 43d Cong., 2d Sess. (1875).

[6] As the Court of Claims found in 1942 (A. 212):

> At the time the Black Hills area was surrounded on almost all sides by white settlements; railroads were in operation, the Union Pacific to the south and the Northern Pacific to the north of the Black Hills; and the Missouri River carried a heavy traffic in steamboats. Thus, facilities were open to white citizens to within comparatively short distances of the Black Hills' gold fields.

used military force to attempt to find and to expel prospectors until it became clear that there was no military solution. As early as 1868, General Terry, who commanded the Department of the Dakota, advised miners planning expeditions to the Black Hills that their invasion would be resisted by military force (A. 4, 308). In 1872, similar mining expeditions were formed at Yankton, Dakota Territory. In response, the territorial governor, at the request of the Secretary of the Interior, issued a proclamation on April 6, 1872, that such expeditions would "not only be illegal, and likely to disturb the peace between the United States and [the Sioux] but * * * the Government will use so much of its civil and military as may be necessary to remove from this Indian Territory all persons who go there in violation of law" (A. 4-7).

When reports that the 1874 Custer expedition had found gold in paying quantities in the Black Hills accelerated unlawful attempts to enter Indian country, the government stepped up its efforts to prevent them. On September 3, 1874, General P. H. Sheridan, commanding the military division of the Missouri, ordered Generals Terry and Ord "to use the force at your command to burn the wagon-trains, destroy the outfit, and arrest the leaders, confining them at the nearest military post in the Indian country" (A. 19, 62, 63, 218) and these orders were published in local newspapers (A. 63). Shortly thereafter, similar instructions to prevent invasions and to remove miners were issued by the Secretary of War (A. 24-26, 80),

the Secretary of the Interior (A. 20-21, 218), and the President (A. 25, 79, 218).

Pursuant to these orders, patrols were dispatched to retrieve expeditions of miners reportedly moving into Indian country (A. 21, 24, 37, 49, 62, 66, 72),[7] their wagons were burned by the army (A. 62)[8] roads into the Black Hills were blocked to "starve out" the miners (A. 49), the Army evicted miners from their claims in the Black Hills and escorted them out (A. 37-38), some offenders were incarcerated (A. 38, 62), and, in general, "very stringent measures" were applied by the Army to enforce the treaty (A. 37-38). See S. Exec. Doc. No. 2, 43d Cong., Spec. Sess. (1875). In sum, by 1875, the "principal object of the military movements" in the Army Departments of the Dakota and the Platte was "to guard" the Black Hills "from the intrusion of those adventurers who, in defiance of law and the treaty obligations of the Government, have persistently attempted to invade that region in search of gold" (A. 38).[9]

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[7] The Army pursued miners in the Black Hills in the winter of 1874-1875 in temperatures "ranging from twenty to forty degrees below zero in the day-time" (A. 73-74).

[8] See also Dep. of William Wade at 199.

[9] Another principal duty was "protecting the settlements from the raids of hostile Indians" (A. 37) (see pages 37 to 40, *infra*).

During this period the Department of the Interior received numerous requests for information concerning the Black Hills to which the Department consistently replied that under the 1868 treaty no white person was permitted in the Black Hills without the consent of the Sioux and the United States (A. 24-26). The Department also refused petitions from miners evicted from the Black Hills to recognize their claims and allow them to return (A. 35-36).

5. *The Impracticality of Preventing The Miners' Intrusion*

By 1875, it became clear, as the court below stated, that these military "endeavors were largely unsuccessful" (Pet. App. 6a). In his annual report for that year the Commissioner of Indian Affairs observed that "notwithstanding the stringent prohibitory orders by the military authorities, and in the face of the large military force which has been on duty in and around the hills during the summer, probably not less than a thousand miners, with the number rapidly increasing, have made their way into the Sioux country" (A. 29, 30). He concluded: "However unwilling we may be to confess it, the experience of the past summer [of 1875] provides either the inefficiency of the large military force under the command of such officers as Generals Sheridan, Terry, and Crook, or the utter impracticability of keeping Americans out of a country where gold is known to exist by any fear of orders or of United States cavalry, or by any consideration of the rights of others" (A. 29, 150-151). In a similar vein, the governor of the Dakota Territory wrote the Secretary of the Interior on June 8, 1875, that "[t]he whole country is red hot on the Black Hills question * * *. Small squads continue to leave Sioux City, Yankton, and other points to invade the reservations, and the volume will increase * * *" (A. 28). General Sheridan "earnestly recommend[ed] some

action which will settle this Black Hills question, and relieve us from an exceedingly disagreeable and embarrassing duty" (A. 37). In short, by 1875 it was "apparent * * * that occupancy of the Black Hills by nonIndians was inevitable * * *" (A. 310).

In these circumstances, on November 3, 1875, President Grant decided that while the orders forbidding entry into the Black Hills by miners should remain effective, "no further resistance by the military should be made to the miners going in" because "such resistance only increased [the miner's] desire and complicated the troubles" (A. 59). The President requested that this decision not be publicized to the miners or anyone else (*ibid.*).[10] From this point on the United States pursued a policy of seeking to solve the Black Hills problem by negotiated settlement.[11]

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[10] The troops withdrew from patrols in the Black Hills in December 1875 and returned to their military posts. During the winter months, entry by miners was effectively prevented by the winter weather (A. 77, 230).

[11] The Court of Claims stated, "[t]he government apparently believed that the Sioux's needs for the rations the government had been supplying them would prevent the Indians from making trouble" (Pet. App. 6a-7a). Although the dependency of the Sioux on the rations was recognized by certain officials (see A. 60, 139-140), there is no evidence, so far as we are aware, that demonstrates that President Grant withdrew the troops from the Black Hills simply because the Sioux were in no position to "make trouble."

6. *1875 Negotiations To Acquire The Black Hills*

Well before the President discontinued military force, the United States had been actively negotiating with the Sioux to purchase the Black Hills and thereby eliminate the treaty violations by prospectors as well as provide compensation to replace the material assistance no longer available under the treaty. In his annual report for 1875 the Commissioner of Indian Affairs recommended legislation "offering a fair and full equivalent" for the Black Hills (A. 29-30, 151-152):

> [I]f [the Sioux] were an independent, self-supporting people, able to claim that hereafter the United States government should leave them entirely alone, in yearly receipt of such annuities only as the treaty of 1868 guarantees, they would be in a position to demand to be left in undisturbed possession of their country, and the moral sense of mankind would sustain the demand; but unfortunately the facts are otherwise. They are not now capable of self-support: they are absolute pensioners of the Government in the sum of a million and a quarter of dollars annually above all amounts specified in treaty-stipulations. A failure to receive Government rations for a single season would reduce them to starvation. They cannot, therefore, demand to be left alone, and the Government, granting the large help which the Sioux are obliged to ask, is entitled to ask something of them in return. On this basis of mutual benefit the purchase of the Black Hills should proceed. If [negotiations fail], I would respectfully recommend that legis-

> lation be now sought from Congress, offering a fair and full equivalent [for the Black Hills], a portion of which equivalent should be made to take the place of the free rations now granted.

Many years later the Indian Claims Commission valued the Black Hills area at $17.1 million, a valuation all parties now accept as its value in 1877. But in 1875 the Black Hills was largely an unknown territory of unknown value. In March 1875 President Grant directed a survey of the area be undertaken "[i]n order to provide for the question of a fair equivalent for this country * * *" (A. 27, 151). This survey was begun March 1875 by Walter P. Jenney (A. 26-27, 151). His voluminous preliminary report in November 1875, although not specifying even an approximation of the worth of the Black Hills, stated that the Black Hills contained not only gold but also excellent timber, agricultural, and grazing lands. S. Exec. Doc. No. 51, 44th Cong., 1st Sess. (1876) (A. 153-158). On the basis of the Jenney Report, the Commissioner of Indian Affairs concluded as follows concerning the proper measure of the consideration due the Indians for yielding up this area (A. 28, 229): [12]

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[12] The Commissioner deemed it irrelevant that the Sioux were then making little use of the Black Hills' resources (A. 229):

> The fact that these Indians are making but little if any use of the Black Hills has no bearing upon the question of what is a fair equivalent for the surrender of these rare facilities for farming and grazing. They are children, utterly unable to comprehend their own great necessities just ahead; they cannot, therefore, see that the country which now only furnishes them lodge-poles and a few antelope has abundant resources for their future wants, when they shall cease to be barbarous pensioners upon the Government and begin to provide for their own living. Their ignorance of themselves and of true values makes the stronger appeal to our sense of what is right and fair.

> The true equivalent to be offered the Sioux, as helpless wards of the Government, for the Black Hills will be found by estimating what eight hundred square miles of gold fields are worth to us, and what three thousand square miles of timber, agricultural, and grazing lands are worth to them.

The negotiations themselves began in May and June 1875 when a delegation of Sioux met, at their request (A. 75), with President Grant and the Secretary of the Interior at the White House (A. 213).[13] The President stated to the delegation (A. 213-215):

> In regard to the Black Hills, I look upon it as very important to them (the Indians) to make some treaty by which, if gold is discovered in large quantities, the white people will be al-

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[13] The United States also sought to obtain Sioux relinquishment of the right to hunt in certain areas outside the reservation (A. 222). An earlier attempt to obtain this concession resulted in an agreement to relinquish all hunting rights in Nebraska. In 1874, Congress enacted legislation to establish a commission to purchase the hunting lands in Nebraska for $25,000 (A. 10-13). Act of June 23, 1874, ch. 455, 18 Stat. 204, 224. An agreement was signed in June 1875 relinquishing the right on condition that an additional $25,000 be appropriated (A. 12-13, 215). Congress never ratified the Act but it did appropriate the additional $25,000 (A. 216). The Sioux, however, continued to hunt in these areas until the 1877 Act (A. 216).

lowed to go there, and they receive a full equivalent for all that is rendered.

* * * * *

The Secretary of the Interior, and the Commissioner of Indian Affairs, will explain to them hereafter, about what would be probably a fair equivalent to the white people and to them which should be given in case they should surrender the Black Hills, or the portion in which gold may be found. As I pointed out to you before, there will be trouble in keeping white people from going there for gold, if it should be discovered * * * it is possible that strong efforts might not be made to keep them out.

My interest is in seeing you protected, while I have the power to make treaties with you which shall protect you. After you go back to your homes and have been there a sufficient time to talk pretty generally with your people, if I get such a word from you as to make it seem desirable, I will appoint commissioners to go out to confer with you. * * * If it should come to the purchase of the Black Hills or a portion of that country from you I would try to see you get a full equivalent in value, and that that money be paid out in U. S. bonds and deposited here, so that the interest would be drawn twice a year for your benefit, and expended for your benefit each year as might be agreed upon, and I look upon it as very important to you, and your children, the Indians who come after you, that you encourage all you can, the children attending schools, in speaking English and preparing yourselves for the life of white men.

* * * * *

> In all this matter, and in all my dealings with the Indians, as I have explained frequently, and once or twice today, I am looking more to their interests than to ours; and I am very anxious that the Government of the United States should pay them in a way that will be of most benefit to them, a full equivalent for all that they have given up, and this is the only way I see a chance of their having in the future a fair equivalent for what they surrender.

The Sioux accepted the suggestion of the President that a commission be established to negotiate for the acquisition of the Black Hills. In June 1875, the Allison commission, chaired by Senator Allison, was appointed and met at the reservation with the Sioux (A. 30-33).[14] Some of the Sioux offered to sell the Black Hills for $70 million (to be paid in food and other material assistance) (A. 168-173), while the commission's best offer was $6 million (likewise to be

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[14] The June 18 instructions of the Commissioner of Indian Affairs to the 1875 Black Hills negotiating commission included this instruction (A. 220-221; emphasis added):

> In negotiating with these ignorant and almost helpless people you will keep in mind the fact that you represent them and their interests not less than those of the Government and are commissioned to secure the best interests of both parties, so far as practicable.
>
> * * * * *
>
> You will also assure the Indians that it is not the wish of the Government to take from them any of their property or rights, without returning *a fair equivalent* therefor, and that you have come, representing their Great Father, to fix upon *an equivalent* which shall be *just both to them and to the white people.*

paid in food and material assistance), or alternatively, $400,000 per year in objects beneficial for their civilization for the right to mine, grow livestock and cultivate the soil in the Black Hills, plus $500,000 (paid over 10 years) for the surrender of the Sioux's off-reservation hunting rights (Pet. App. 16a-17a).[15] No agreement was reached (*ibid.*).

In its lengthy report on the negotiations (A. 158-195), the commission essentially concluded that the Sioux were being unreasonable in demanding that the United States undertake extensive policing of the Black Hills while the Sioux themselves violated other conditions of the treaty and continued to expect gratuitous material assistance from the government without making any serious effort to become self-supporting (A. 34-35, 190-191):

> [U]ntil this treaty is abrogated by the authority of the United States, it is the duty of the Government to see that this "solemn promise" [to permit no entries into the Black Hills] is enforced. When we remember that the exterior boundaries of the reservation cover an extent of over twelve hundred miles, we can realize the magnitude of this promise, especially when for nearly four hundred miles the eastern boundary is the Missouri River, and the south and west

[15] This 1875 Black Hills tract appears to be only about half the size of the one ultimately transferred in 1877, but the Indian Claims Commission assigned about 75% of the 1877 tract's value to this 1875 tract. See 33 Ind. Cl. Comm. at 272-273, 287, 303 and 357. All the township, timber and mineral values v ere within the 1875 tract, together with most of the agricultural value and about half the grazing values.

> an open plain, so that roads are not necessary to enable persons to enter upon the reservation. The Black Hills are nearly in the center of the reservation from north to south, and easily accessible from all sides, except, perhaps, the north. The measure of force to be employed by the United States in enforcing this article of the treaty depends upon the good faith of the Sioux Nation with reference to their obligations. The obligations of the treaty are mutual and reciprocal. The Indians at the post have not so acted as to require the utmost vigilance on the part of the United States. They promised to maintain peace and order on the reservation. A failure to keep this promise would entail a heavy expenditure on the part of the Government, yet they have so conducted themselves, while receiving the bounty of the Government, as to make the establishment of expensive military post necessary at all the agencies. At Red Cloud there are four companies of infantry and two of cavalry; at Spotted Tail, three of infantry and one of cavalry; a post at Fort Laramie, contiguous to the reservation; and a small force at each of the other agencies; all made necessary by the conduct of the Indians, and all requiring great expense for their maintenance, except those on the Missouri River, on account of the distance from cheap transportation. Now, they ask that the Government shall use this military force, not only to preserve order and protect property at the agencies, but also that it shall be used against citizens of the United States who choose to violate law and treaty-obligations, and who, in addition, take the risks of conflict with the In-

dians for the shadowy prospect of gold in the Black Hills!

* * * * *

> Before the Sioux Nation is in position to exact so much of the Government, it should relieve the Government of the necessity to force to protect its own agents and property, purchased for the use of the Indians with money voluntarily appropriated from the public Treasury, and should comply with the provision that requires them to move to a designated place upon their reservation. They insist that the value of the Hills shall be estimated at many millions because of the gold easily acquired, but they refuse to become self-supporting by making effort to acquire it.

The commission analyzed the plight of the Sioux in detail and stressed that the Sioux Nation faced two basic problems (i) their failure to achieve self-sufficiency, their need for a plan designed to achieve self-sufficiency and a means of support until that time (A. 177-178, 183-187), and (ii) the impossibility of keeping whites out of the Black Hills (A. 165, 190-191). The commission, drawing on the lessons of successes achieved by the Choctaws and the Creeks, recommended that because an agreement with the Sioux was impossible to attain, legislation very much like the 1877 Act be passed unilaterally by Congress for the benefit of the Sioux. Such legislation would provide incentives for a "comprehensive system of education" of children and instruction in farming of adults so that the Sioux would eventually be-

come self-supporting (A. 183-189). The commission proposed that rations be provided to the Sioux so long as the conditions for education and labor were met (A. 183-189, 193), to be purchased from a fund created by the payment of an "equivalent" for the Black Hills for the benefit of the Sioux (A. 194). Although the commission did not specify how long it would take to achieve self-sufficiency, the commission clearly contemplated that a full generation of children would have to be educated (A. 184-185). The commission recommended that such a plan be submitted to the Sioux "as a finality" on pain of discontinuation of gratuitous rations (*ibid.*). The experiment was "sure to be resisted at first," said the commission, "but will be assented to gladly in time * * *" (A. 192).

7. *The 1876 Agreement And The 1877 Act*

(a) In the aftermath of the Allison commission, Senator Allison reported a bill for the Committee on Indian Affairs that recited that "persons are now going into the Hills in such numbers as to preclude their prosecution under existing laws, or their removal without the use of a large military force," that the Sioux "are not likely to have in the near future [] the necessary means of self-support," that the United States was "under no obligation by treaty to provide subsistence," and that "there is imminent danger of hostilities growing out of the situation." S. 590, 44th Cong., 1st Sess. (1876); 4 Cong. Rec. 1796 (1876). The bill would have authorized a new commission to explain these circumstances to the Sioux

and to state the desire of the United States "to give them a proper equivalent for the use and occupation of the Hills by the whites" and "to make an agreement with them which will provide for their subsistence and support by appropriations from year to year for a period not exceeding ten years" and, in exchange, the Sioux would relinquish the Black Hills (*ibid.*). The bill as the committee and the Senate amended it (*id.* at 1797) further provided that "all appropriations hereafter made" for the subsistence of the Sioux nation "shall be" upon condition that they will agree "to the conditions set forth" and "no money shall be expended for the subsistence of the Sioux nation unless upon said conditions" after July 1, 1877.[16]

Senator Allison explained the committee bill as follows (4 Cong. Rec. 1798 (1876)):

> [I]t is not proposed by this bill to interfere in the slightest degree with our treaty obligations except in so far as the public circumstances compel us to do so. It is impossible for the Government, except at a very large expense, to remove from the Black Hills the people who are going in there now by the thousand. Why? Because of the character of the country and because of the ease with which persons go in there with their teams and wagons. This bill contemplates that, instead of attempting to do that,

[16] The March 15, 1876, bill replaced a similar version introduced by Senator Allison two days earlier bearing the same number. 4 Cong. Rec. 1796 (1876). The earlier bill would have allowed rations appropriations after July 1, 1876, only on the conditions stated.

> we attempt to make a new bargain with these Indians in reference to that country. It is true we say to them in terms by the second section of the bill that if they do not agree to a reasonable bargain we will cease to support them from the Treasury of the United States, which we now do outside of and beyond any treaty stipulation that we have with them. We obligated ourselves under the treaty of 1868 to subsist these Indians for four years. That term expired in 1873. We are under no obligation now to subsist them that I know of by any treaty; but every Senator who has investigated the question knows perfectly well that these Indians cannot become self-supporting where they now are in any reasonable time; and therefore the alternative is presented to Congress either to subsist them or to starve them or to compel them by force of circumstances to raid upon the border settlements and to subsist themselves in that way.
>
> This is the best adjustment that your Committee on Indian Affairs could make in reference to this subject. I agree with the Senator from Texas that if it was practicable it would be better to remove the people who are now in the Black Hills from this reservation. They are there without authority of law, and in violation of law actually. They have no authority there. We solemnly set apart this region of country, including the Black Hills, for these Indians by the treaty of 1868; but people have gone in there, and it is a question of public policy with us whether or not we shall use the whole Army of the United States against our own citizens for the purpose of recovering this country because gold has been discovered there.

After extensive debate (*id.* at 1796-1801, 1829-1830, 2177, 3530-3539),[17] the bill was further amended to eliminate the provision for the conditional termination of subsistence after one year so that it simply established another commission to negotiate with the Sioux "for the cession to the United States" of parts of the reservation and adjacent territory "or otherwise for the preservation of peace." *Id.* at 3539. The Senate passed it in that form on June 3, 1876 (*ibid.*).[18] In the House, S. 590 was reported with an amendment which specifically permitted the proposed commission to negotiate for the acquisition of the Black Hills (*id.* at 3817). S. 590 was recommitted to committee by the House and died in committee (*id.* at 4470, 4520).

[17] During these debates, it was clear that the termination of subsistence appropriations would begin, if at all, on July 1, 1877, and not immediately. Senator Allison stated that the committee "thought that it would be too soon to provide these conditions in an appropriation made for the current year beginning the 1st of July next, and therefore it would be better to postpone the time one year, or at least leave that discretionary." 4 Cong. Rec. 1796 (1876). Senator Bogy reported that the committee on Indian Affairs thought "it was better not to refuse to feed them now and to feed them for this summer, and let the Indians know that unless some arrangement be made with them the feeding will not be continued hereafter." *Ibid.*

[18] On April 18, 1876, the Senate passed a resolution requesting the Secretary of the Interior to provide it with a copy of the report by Professor Jenney on the resources of the Black Hills (see page 16, *supra*). S. Exec. Doc. No. 51, 44th Cong., 1st Sess. (1876). The final report was transmitted to the Senate on April 21st. *Id.* at 1.

On June 6, the House passed H.R. 3478, the appropriations bill for the Indian Department, which stated that no portion of the subsistence appropriation of $1 million to the Sioux would be available at any time unless and until the Sioux first agreed to abandon all claims to lands outside the reservation. *Id.* at 3498, 3503-3508, 3639. As to all tribes (and not only the Sioux) the House bill provided that "none of said sums shall be paid to said Indians until they cease their hostilities against white people." *Id.* at 3639. The bill contained no proviso requiring the sale of the Black Hills.[19]

On June 20, the Senate modified H.R. 3478 to provide that one-half of the $1 million appropriation for Sioux subsistence for 1876-1877 would be suspended until the Indians agreed to cede the Black Hills and to relinquish all interest in land outside the reservation.[20] *Id.* at 3902. The House refused to ac-

[19] Although the legislative history is silent on the point, the appropriations bill as passed by the House, did not address the Black Hills question evidently because S. 590 was already pending in the House.

[20] Presumably $500,000 would have been authorized for the first six months of the fiscal year and the remaining $500,000 suspended until the statutory conditions were met or Congress modified them. In making this amendment, the Senate Committee on Appropriations felt if the United States "were compelled to grant this large amount of money for their subsistence, they should be required to relinquish this outside territory, a small portion, comparatively, of their reservation. We make this gratuity on the condition of that relinquishment, hoping it will preserve the peace in that country." 4 Cong. Rec. 3902 (1876).

cede to numerous changes in the appropriations bill made by the Senate (*id.* at 4043), and successive conference committees were appointed. *Id.* at 4043, 4057, 4324, 4563, 5463, 5539. By July 1, 1876, however, the *only* issue of disagreement within the conference concerned a proposed abolition of the Indian Bureau and the transfer of its duties to the War Department.[20a] On August 14, 1876, an agreement was reached on that issue and the appropriation bill was enacted (*id.* at 5601).

As passed, the bill was more generous than the Senate version had been. The full amount of the $1 million appropriation was made available for the fiscal year. The prohibition (that applied to all tribes) against assistance to hostile tribes was relaxed to prohibit only assistance to "any band" of a tribe "engaged in hostilities." 19 Stat. 192 (A. 329-330). The act provided that "hereafter there shall be no appropriation made" for the subsistence of the Sioux unless they first relinquished claims to the hunting grounds outside the reservation, ceded the Black Hills within the reservation, and some agreement was

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[20a] The Senate conferees reported on July 1, 1876, that the conference was deadlocked over only one issue. Senator Windom stated (4 Cong. Rec. 4324; emphasis added):

> I will state briefly the ground of the disagreement between the two committees. *It was wholly with reference* to the third section of the bill, which provides for the abolition of the Indian Bureau and for the performance of the duties of that Bureau by the War Department * * *.

reached with them calculated "to enable said Indians to become self-supporting." *Ibid.*[21]

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[21] The Court of Claims states (Pet. App. 19a) that the Act "cut off" rations for the Sioux unless they met the stipulated conditions. The cut off, however, was not immediate and was set for a year later. The full $1 million was appropriated for the period July 1, 1876-June 30, 1877 with no conditions other than no rations should be given to hostile bands. Only appropriations to be made "hereafter" were tied to relinquishment of the Black Hills. This was also the intent expressed concerning the similar language in S. 590 (see note 17, *supra*). In the Senate version of H.R. 3478 the funds suspended were clearly funds from the current appropriation of $1 million. That language said "only one-half of the last named sum shall be available * * * unless" the conditions were met. 4 Cong. Rec. 3902 (1876). This contrasts sharply with the "hereafter there shall be no appropriation made" language used in the final act.

Moreover, although hostile Sioux who refused to disarm themselves were denied rations (except as prisoners), as required by the 1876 Act, non-hostile Sioux and hostiles who surrendered were not denied rations in 1876-1877 (see A. 52-53, 118). In his report dated October 30, 1876 the Commissioner of Indian Affairs stated that although provisions had been in short supply at the agencies due to transportation difficulties and the failure of Congress to pass the annual appropriations bill until August 15, 1876 (although two interim deficiency appropriations were passed in April and July 1876), "[i]mmediately on the passage of the act [on August 15, 1876], advertisements for proposals for beef, flour, and other supplies" were made. Awards had been made by October 30, 1876. 1876 Annual Report of the Commissioner of Indian Affairs iv-vi. The annual reports for 1876 and 1877 of the Indian agents in charge of the various agencies reported no cut off in rations to non-hostile Sioux. To the contrary at least two agents when asked by reservation Sioux concerning the rumors that no further assistance would be rendered by the government, replied that "all Indians known to be friends of the Government will receive kind treatment and

Although the Court of Claims appeared to suggest otherwise (Pet. App. 7a, 19a), the conference committee did not toughen the Sioux provision in response to news of Custer's defeat on June 25, 1876, at the Little Big Horn. The Sioux rider was settled no later than July 1 (see note 20a, *supra*)—before reports of the battle reached Washington. The news of the massacre reached Washington on July 5, 1876 (A. 314), as the Sioux concede. Appendix to Reply Brief of Sioux Nation (in Court of Claims) C-11. Even on July 7, 1876, Congress did not know the accuracy of the report. On July 7, 1876, the Senate

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every consideration, and that only those who have been in open hostility are to be chastised." 1876 Annual Report of the Commissioner of Indian Affairs 23; 1877 Annual Report of the Commissioner of Indian Affairs 52. Similarly, none of the numerous headmen or chiefs whose speeches were transcribed during the lengthy negotiating sessions in September and October 1876 complained that non-hostile Sioux were being denied rations at that time. This omission is significant inasmuch as many of them registered other related complaints (*e.g.*, lack of farm implements, horses, and ammunition) or discussed rations in general (*e.g.*, whether rations should be dispensed by weight). They undoubtedly would have included a call for resumption of rations had rations been totally denied them. See S. Exec. Doc. No. 9, 44th Cong., 2d Sess. 29-90 (1876). Moreover, implicit in the suggestion by some Sioux that the rations ought to be increased and the statements that their agents treated them well was recognition that rations continued to be available to nonhostile Sioux (*id.* at 34, 37, 50, 63, 72, 84). (We acknowledge that the Court of Claims in 1942 (A. 234) made a somewhat ambiguous finding that implies there was a suspension of rations as of August 15, 1876, and that our brief below recited this ambiguous finding (Br. 36); but, for the reasons stated, this was not so.)

passed a resolution asking the President to advise it "whether the recent reports of an alleged disaster to our forces under General Custer in that region are true." S. Exec. Doc. No. 81, 44th Cong., 1st Sess. 1 (1876). The final measure was actually more generous than the Senate version had been, so it is difficult to believe that the news of the battle resulted in punitive legislation. The final measure was similar to S. 590. Its purpose was explained well before the massacre by Senator Allison (see pages 24-25, *supra*). There is no suggestion at all in the history of the conferences between the House and the Senate revealing any motive to retaliate against the friendly Sioux bands because of the actions of the hostile Sioux.

(b) On August 24, 1876, the President appointed the commission to negotiate with the Sioux Tribe as provided in the 1876 Act. This commission, chaired by George Manypenny,[22] proceeded to the Sioux country to conduct negotiations with the several bands at the different agencies on the Great Sioux Reservation and submitted to them a proposed agreement conforming to provisions of the Act of Congress. The instructions to the commission, referring to the rider to the appropriations Act, stated that "the Indians should be made to understand distinctly that they can hope for continued appropriations only by full submission to the authority and wishes of the Government and upon full evidence of their disposition

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[22] Manypenny authored *Our Indian Wards* (1889), a most sympathetic treatise of the Indians.

to undertake in earnest measures for their own advancement and support." S. Exec. Doc. No. 9, 44th Cong., 2d Sess. 4 (1876). In its meeting with the Sioux the 1876 Commission "submitted to the Indians the conditions required by Congress, and stated that we had no authority to change them in any particular." *Id.* at 6. The commission explained to the Indians the intent, meaning, and effect of the Act of Congress and the proposed agreement, noting that the subsistence provisions of Article X of the treaty of 1868 had long since been fulfilled and had become extinguished, and that there no longer rested upon the government any obligation to appropriate and disburse large sums annually for their subsistence.

The chiefs, head-men, and less than ten percent of the male adult Indians of the tribe at the different agencies assented to and signed the agreement on dates ranging from September 20 to October 27, 1876 (A. 233-234, 335-346). The proceedings at the various agencies were transcribed. See S. Exec. Doc. No. 9, 44th Cong., 2d Sess. (1876). Most of the numerous head-men and chiefs who stated their wishes appeared willing to sell the Black Hills and in general suggested payment in material support and rations.[23]

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[23] For example, White Eyes said (*id.* at 54):

> The Great Father has asked us to give up the Black Hills. He has probably taken into consideration the value of the hills and expects to *give us an equivalent for them. I think that equivalent will be that our children and poor people will be taken care of*; and that we will have such implements as we need to cultivate the ground and such animals as we need to raise stock from. These things that you have promised to our people and the things that I have asked for we understand are not to be for one issue only, or for one time, but we are to have *this help as long as we live, if necessary.*

Charger, a Sioux chief under the Cheyenne River Agency, stated it in this fashion (*id.* at 61-62):

> I understand that the Great Father formerly gave us rations under treaty, now the treaty has run out, and the council refuses to give us rations, and you come again to correct this. Both sides want to make the thing over again, make it new, both Indians and whites. For our part we would like to stop all war with the Indians, not commit any more depredations, and make peace. * * * This country that you wish to buy from us you tell us is of no use to us; that we do not dig the gold out of it at all. That is true, we do not use it; but, at the same time, we wish to have pay for it when we sell it. The Great Father's people take money out of that country; that money ought to go toward buying us provisions and clothing; if you do that, that will be satisfactory to me. There are many things that I see the Indians are not able to do in the whites' way; we want to learn these things.

Chiefs at the Red Cloud and Spotted Tail Agencies were willing to trade the Black Hills in consideration of five more years of food (A. 51).

Article 5 of the agreement provided in part (A. 333):

> In consideration of the foregoing cession of territory and rights, and upon full compliance with each and every obligation assumed by the said Indians, the United States does agree to provide all necessary aid to assist the said Indians in the work of civilization; to furnish to them schools and instruction in mechanical and

agricultural arts, as provided for by the treaty of 1868. Also to provide the said Indians with subsistence consisting of a ration for each individual of a pound and a half of beef, (or in lieu thereof, one-half pound of bacon,) one-half pound of flour, and one-half pound of corn; and for every one hundred rations, four pounds of coffee, eight pounds of sugar, and three pounds of beans, or in lieu of said articles the equivalent thereof, in the discretion of the Commissioner of Indian Affairs. Such rations, or so much thereof as may be necessary, shall be continued until the Indians are able to support themselves.

Article 5 went on to provide that whenever the able-bodied Indians were located on lands which were suitable for cultivation that they would be expected to work the land and to provide themselves and their families (the aged, sick, and infirm excepted) with such support as they were able (A. 333). As an added incentive to cultivating industrious habits the Commissioner of Indian Affairs was authorized to provide those who labored other necessary articles as are requisite for civilized life. It was further promised that (A. 333-334):

> The Government will aid said Indians as far as possible in finding a market for their surplus productions, and in finding employment, and will purchase such surplus, as far as may be required, for supplying food to those Indians, parties to this agreement, who are unable to sustain themselves; and will also employ Indians, so far as practicable, in the performance of Government work upon their reservation.

Article 6 provided (A. 334):

> Whenever the head of a family shall, in good faith, select an allotment of land upon such reservation and engage in the cultivation thereof, the Government shall, with his aid, erect a comfortable house on such allotment * * *.

In its report to Congress on the agreement, the Manypenny commission eloquently argued that the Sioux had, up to that time, been repeatedly done injustice by the United States and called for several reforms (A. 105-114). In connection with the seizure of ponies and arms of certain Sioux erroneously suspected of being hostile (see page 40, *infra*), for example, the commission insisted that "[t]he least we can do is to repay these friendly Indians honestly for the full value of the property which was taken" (A. 118). It also concluded that the Allison commission had failed because it had "no authority to offer [the Sioux] any sum which would be a just equivalent for their right in the Black Hills * * *" (A. 112). Notwithstanding the commission's extreme sensitivity to the need to right the wrongs done and to pay just equivalent, the commission nowhere stated that it thought the 1876 agreement denied a just equivalent or otherwise constituted still another injustice. To the contrary, the commission concluded (A. 120) that "[w]e are confident that this agreement contains provisions which, if faithfully carried out, will save these Indians and redress some of the wrongs [of the past]."

Congress approved the agreement on February 28, 1877, ch. 72, 19 Stat. 254 (A. 331-346).[24] Thereafter, the United States took possession of the Black Hills and, pursuant to the 1877 Act, appropriated over $57 million in material assistance between 1877 and 1951.[25] In 1889, an agreement signed by three-fourths

[24] This was accomplished by an act of Congress, and not by treaty, because the Executive Branch had been deprived of its power to contract by treaty (subject to Senate ratification) by the Act of March 3, 1871, ch. 120, 16 Stat. 566, 25 U.S.C. 71. This followed years of "resentment" by members of the House of Representatives that, although they "had no voice in the development of substantive Indian policy reflected in" Indian treaties, they were nonetheless expected to initiate necessary appropriations to carry them out. *Antoine* v. *Washington*, 420 U.S. 194, 202 (1975).

[25] The record contains an eight volume, 4,385-page General Accounting Report concerning the Black Hills and hunting rights claims (Sioux Exh. 3 in Docket 74). On pages 6-8 of that report the expenditures made to these Sioux by the United States are summarized and show that a total of $109,289,559.39 had been paid up to June 30, 1925. The largest single items listed are the $21,543,519.03 paid pursuant to the 1868 Treaty and the $36,930,367.03 paid pursuant to the 1876 Agreement—1877 Act. The breakdown and supporting data to the $36,930,367.03 is set out in detail on pages 815-1056. To the total expenditures of $36,930,367.03, the Court of Claims added the $3,055,450.53 expended for fiscal years 1875 and 1876 and reached a total amount of $39,993,962.50. (This latter amount is some $8,144.94 more than the sum of the two figures. The reason for this variance is not known.) The Court of Claims further noted that amounts expended between June 30, 1926, and 1935 brought the total to approximately $43,000,000. The expenditures from 1935 to 1951 brought the total to $57,048,106. See *Sioux Tribe* v. *United States*, 146 F. Supp. 229, 234 n.2 (Ct. Cl. 1956).

In addition, in *Sioux Tribe* v. *United States*, 105 Ct. Cl. 658 (1946), plaintiffs' claim was based upon the transfer of

of the Sioux, provided that the 1876 agreement was "continued in force * * *" (A. 235).[26]

8. *The Sioux War: 1876-1881*

Although the Sioux subject to the 1868 treaty promised to "regard [the Great Sioux] reservation their permanent home, and [to] make no permanent settlement elsewhere" (A. 323, 325), they reserved the right to hunt on certain lands north of the North Platte, and on the Republican Fork of the Smoky Hill river "so long as the buffalo may range thereon in such numbers as to justify the chase" (A. 323-325). Most "friendly" bands moved to the Great Sioux Reservation and settled near the various government agencies, but a few "hostile" bands, notably the bands led by Sitting Bull and Crazy Horse, refused to recognize the treaty, continued to make their permanent home outside the reservation and continued their nomadic, hunting way of life (A. 45-46, 48). These hostile bands—in derogation of the 1868 treaty promise to withdraw all opposition to

Sioux lands under the provisions of the Act of March 2, 1889, ch. 405, 25 Stat. 888, but defendant claimed as part of its allowable offsets more expenditures listed in the General Accounting Report under the 1877 Act. The findings set out a number of the 1876-1877 expenditures shown in the General Accounting report and conclude that these obligations ($34,504,374.50 as applicable therein) were assumed by the United States under the 1877 Act and accordingly could not be offset against the 1889 claim of the Sioux. 105 Ct. Cl. at 703-709, 715-716.

[26] This was part of the agreement ratified by the allotment Act of March 2, 1889, ch. 405, 25 Stat. 888; 26 Stat. 1554.

the construction of railroads, to wagon trains, and to settlers (A. 324)—raided the railroads, military posts, and agencies (A. 7, 15, 37, 39, 42-48, 125-128, 135). They also made war from time to time on certain friendly tribes—the Arickarees, Mandans, Gros Ventres, Assinaboines, Blackfeet, Payans, Crows and other friendly Sioux—who complained bitterly to the United States that it was not protecting them and who threatened to take up hostilities themselves unless they were protected (A. 39-42, 48, 197). See also 4 Cong. Rec. 3506, 4478 (1876).[27]

On November 9, 1875, E. C. Watkins, United States Indian Inspector, reporting on these hostilities, advised the Commissioner of Indian Affairs that such attacks frustrated the attempts of friendly tribes to learn to cultivate the soil and that the government owed it to them to take severe military action against the hostile bands (A. 39, 125-127). The Commissioner and the Secretary of the Interior agreed that such action would be recommended to the Secretary of War unless all such Sioux reported to the agencies on the reservation by January 31, 1876 (A. 41-42, 127-129). Pursuant to an order dated December 6, 1875, the Indian agents sent messengers to advise all Sioux

[27] In 1876 the Commissioner of Indian Affairs estimated that at least 41,000 Sioux lived on the reservation and that 3,000 "hostiles" lived off the reservation (A. 45, 140). See also the 1870 Annual Report of the Commissioner of Indian Affairs 4; 1873 Annual Report of the Commissioner of Indian Affairs 45-46. The reservation Sioux had settled near six agencies—Santee, Crow Creek, Cheyenne River, Standing Rock, Red Cloud and Spotted Tail (A. 220).

outside the reservation of the order (A. 129). This order applied not only to hostile Sioux but also some reservation Sioux who had been granted permission by their agents to leave the reservation to hunt (A. 112-113). Although some of the Sioux advised the agents that, due to winter snows, they were unable to go to the reservation and that they would go there in the spring (A. 113), the Secretary of the Interior was advised that "Sitting Bull * * * refuse[d] to comply" with the order (A. 43, 133, 134). On February 1, 1876, the Secretary of Interior "turned over to the War Department" the Sioux off the reservation "for such action on the part of the Agency as you may deem proper under the circumstances" (A. 43).

Shortly thereafter and continuing through 1881 the Army conducted military operations against those Sioux who persisted in their refusal to return to the reservation (A. 43-49). Although inevitably questions arose concerning whether the campaign was linked to the Black Hills question, the Secretary of the Interior advised Congress that "[n]o part of these operations [was] on or near the Sioux reservation" (A. 47) and that the "discovery of gold [in the Black Hills], and the intrusion of our people thereon, have not caused this war * * *. The object of these military expeditions was in the interest of the peaceful parts of the Sioux Nation," which he estimated at "nine-tenths of the whole," and "not one of these peaceful or treaty Indians has been molested by the military authorities" (A. 47). After a serious setback

at the Battle of the Little Big Horn on June 25, 1876, the Army defeated the hostile bands who retreated to Canada.[28]

During at least part of the Sioux War, control of the agencies was turned over to the Army (A. 52). Tribal members who had participated in hostilities against the United States were permitted to return to the reservation only so long as they surrendered their guns and horses (A. 52-53). It appears that many friendly Sioux were disarmed and dismounted on the suspicion that they had been or might become hostile (A. 117-118). This deprived them of any convenient means of killing small game and was one of the complaints registered by the chiefs at the August-October 1876 negotiating sessions (A. 117-118). See S. Exec. Doc. No. 9, 44th Cong., 2d Sess. 19-90 (1876). Although the dependence on rations of those disarmed may have increased as a result of this war-time measure, there is no evidence that the compelled surrender of weapons was intended to force the Sioux to sell the Black Hills on pain of starvation. The 1942 decision of the Court of Claims found (A. 238) that there was no direct connection between the war and the Black Hills question.

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[28] The major campaigns occurred before 1878. The hostile Sioux retreated into Canada in 1878. In 1881 Sitting Bull surrendered under a promise of amnesty. D. Robinson, *History of the Dakota or Sioux Indians* 447 (1956 ed.).

B. Judicial Proceedings

1. *The 1942 Court of Claims Judgment*

The removal of the Black Hills from the Sioux Reservation has been the subject of litigation since 1923. The claim was first raised in 1923 in the Court of Claims pursuant to a special jurisdictional act.[29] The Court of Claims, after setting forth in exhaustive detail the historical antecedents to the 1877 Act,[30] concluded that Congress had exercised its plenary power of guardianship over Indian tribal property "pursuant to a policy which the Congress deemed to be for the interest of the Indians and just to both parties * * *" (A. 243). Applying the doctrine of *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903), the court held that no Fifth Amendment taking had occurred. Having found that the Sioux had proved no legal claim for just compensation, the court held that the special jurisdictional act provided no equitable jurisdiction to examine the issue of whether the Sioux had in fact received fair consideration for the Black Hills.[31]

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[29] Act of June 3, 1920, ch. 222, 41 Stat. 738.

[30] *Sioux Tribe of Indians* v. *United States*, 97 Ct. Cl. 613, 616-657 (1942), cert. denied, 318 U.S. 789 (1943). This opinion is reproduced in part in the Appendix (A. 202-256).

[31] "In the absence of a clear grant of authority by Congress, we have no jurisdiction to go behind the acts of Congress and inquire into any moral obligation of the Government or to determine whether what the Congress agreed to pay, and has paid, was adequate compensation for that which the Indians were required to surrender" (*Sioux Tribe of Indians* v. *United States, supra*, 97 Ct. Cl. at 685).

2. *The 1975 Court of Claims Decision*

The Indian Claims Commission Act of 1946, ch. 959, 60 Stat. 1049, 25 U.S.C. 70 *et seq.*, provided the jurisdiction which the Court of Claims had lacked in 1942. It authorized recovery by tribes for payment of inadequate consideration for tribal lands, 25 U.S.C. 70a(3) and (5).[32] A second round of litigation was commenced before the Indian Claims Commission under 25 U.S.C. 70a(3) and (5), on allegations that government acquisition of the Black Hills was for unconscionable consideration and not as a result of fair and honorable dealings.

The Indian Claims Commission ultimately held [33]

[32] 25 U.S.C. 70a provides in part: "The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe * * * (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; * * * (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity * * *."

[33] The Indian Claims Commission initially held that no claim for dishonorable dealings or unconscionable conduct had been proved. 2 Ind. Cl. Comm. 646 (1954). The Court of Claims affirmed. 146 F. Supp. 229 (1956). In 1957, the Sioux moved for a new trial, claiming inadequacy of prior counsel, and requested that the Court of Claims vacate its 1956 judgment of affirmance and remand for reconsideration based on both the existing record and such additional proof as might be offered. In 1958, the Court of Claims granted the motion in part, remanding to the Indian Claims Commission for a determination whether the record should be reopened. See 182 Ct. Cl. 912 (1968). See also *Sioux Tribe* v. *United States*, 500 F.2d 458, 475-477 (Ct. Cl. 1974). It was.

that the 1877 Act was a taking for which the Sioux were entitled to just compensation including simple interest at 5% per annum from the date of taking.[34] On appeal, the Court of Claims held that the Commission's finding of a Fifth Amendment taking was barred by the Court of Claims' 1942 decision as res judicata.[35] Nevertheless, it held (A. 263) that the Sioux were entitled to recover the principal amount of the Commission's award without interest, under the dishonorable dealings provision of the Indian Claims Commission Act, 25 U.S.C. 70a(5).

3. *The Present Proceedings*

In 1978, Congress amended Section 20(b) of the Indian Claims Commission Act of 1946, 25 U.S.C. 70s(b), so as to direct the Court of Claims to review the merits of the 1974 Indian Claims Commission decision without regard to the defense of res judicata or collateral estoppel. Act of March 13, 1978, Pub. L. No. 95-243, 92 Stat. 153.[36] The judgment now presented to this Court results from that review.

[34] *Sioux Nation* v. *United States*, 33 Ind. Cl. Comm. 151, 362-363 (1974) (A. 264-299).

[35] *United States* v. *Sioux Nation*, 518 F.2d 1298 (Ct. Cl.), cert. denied, 423 U.S. 1016 (1975) (A. 257-263).

[36] Final judgment was not entered following the 1975 decision of the Court of Claims pending further proceedings before the Indian Claims Commission. The Act of March 13, 1978, then intervened, opening the question whether a taking had been effected necessitating the payment of interest. No payment pursuant to the court's 1975 decision has been made.

The Court of Claims, sitting en banc and examining the same antecedents to the 1877 Act which were before it in 1942, held, over two dissents, that the United States was liable for a Fifth Amendment taking for the removal of the Black Hills from the Great Sioux Reservation (Pet. App. 1a-70a). The court began by observing that "[o]rdinarily, when the United States appropriates property interests of others, that constitutes a taking under the fifth amendment, for which the United States is obligated to pay just compensation" (Pet. App. 9a). The court, however, recognized that a proper exercise of Congress' plenary power to control Indian affairs is not a taking even though it transmutes tribal land into other forms of property (Pet. App. 9a-10a). A proper exercise of this plenary power occurs the court said (*id.* at 10a), quoting *Three Affiliated Tribes of Fort Berthold Reservation* v. *United States*, 182 Ct. Cl. 543 (1968), only where "Congress makes a good faith effort to give the Indians the full value of the land and thus merely transmutes the property from land to" another asset. "This," the court observed (*ibid.*), "is a mere substitution of assets or change of form and is a traditional function of a trustee."

In the present case, the court found "no evidence" that Congress had made a good faith effort to give full value. The court deemed it immaterial that the United States spent $43 million or more in fulfillment of its obligation under the 1877 Act. The court noted that a good-faith trustee cannot be faulted if hindsight should demonstrate a lack of precise equivalence (Pet. App. 11a). Conversely, a trustee who does not act in good faith is not redeemed merely because the exchange, in hindsight, turns out to be more than a fair equivalence (*id.* at 11a-12a). Rather, the court held the test is whether the trustee (*i.e.*, Congress) makes—at the time of the exchange—a good faith effort to give the Indians the full value of the land (*id.* at 12a, 28a).

The court stressed two considerations it felt relevant in determining the "good faith" of Congress. First, it held that the inquiry was "an objective inquiry into the nature and purpose of the congressional action, not an attempt to determine the subjective motive of the legislature in taking that action" (Pet. App. 11a). The objective facts are "revealed by Acts of Congress, congressional committee reports, statements submitted to Congress by government officials, reports of special commissions appointed by Congress to treat with the Indians, and similar evidence relating to the acquisition" (*ibid.*). Second, it placed the burden of justifying its action on Congress and held that where there is "no evidence" that Congress believed the tribe received a fair equivalence, then the statute is a taking and not a valid exercise of the plenary power to manage Indian property (*id.* at 12a-13a n.2).

The court summarized the circumstances leading up to the 1877 Act and found it decisive that at no point did Congress affirmatively state the Sioux received a fair equivalent for the Black Hills (Pet. App.

22a, 24a, 25a, 26a).[37] The court speculated that Congress probably thought the promise to supply rations would end relatively soon and therefore was not expected to be very costly. S. 590 had originally called for further subsistence "from year to year for a period not exceeding ten years * * *" (see page 24, *supra*; Pet. App. 27a). Even though the ten-year limitation was deleted from the final measure the court evidently felt that Congress actually "hoped and anticipated" that the Sioux would be self-sufficient in "a relatively short time." Thus, "[t]here is no reason to believe," the court said, that Congress anticipated that it would be required to supply rations for more than fifty years or that the value of those rations would far exceed the value of the Black Hills (*id.* at 27a-28a). In short, Congress failed to state affirmatively

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[37] For example, the court said:

> There is no indication that Congress believed that, or even considered whether, the obligation it assumed * * * constituted the fair equivalent of the value of the lands * * *. [Pet. App. 26a.]
>
> The terms upon which Congress acquired the Black Hills were not the product of any meaningful negotiation or arm's-length bargaining, and did not reflect or show any considered judgment by Congress that it was paying a fair price. [*Id.* at 25a.]
>
> [There was a] lack of any discussion [in Congress in 1877] of whether the "consideration" * * * was adequate * * *. [*Id.* at 24a.]
>
> [The Manypenny commission's report in 1876] [n]owhere [indicated] that it believed the provisions for rations constituted a fair equivalent * * *. [*Id.* at 22a.]

in its legislative history that it believed a fair equivalent was being returned for the Black Hills. This omission, since the burden of proof was on Congress to establish its good faith, was fatal and dispositive.

The court also determined, contrary to its 1942 holding, that *Lone Wolf* v. *Hitchcock*, *supra*, was not controlling precedent because, in the majority's view, *Lone Wolf* had not reached the question of whether enactment of legislation appropriating Indian lands in return for specified compensation constituted a taking for purposes of the Fifth Amendment (Pet. App. 28a-33a).[38] Having found that a Fifth Amendment taking had occurred, the Court of Claims held that the United States would be liable, not only for the value of the property taken, but also for interest

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[38] Judge Nichols, concurring, joined on this point by Judges Bennett and Kunzig, dissenting, questioned this analysis, reasoning that although the Indian plaintiffs in *Lone Wolf* had stated a claim under the Fifth Amendment, they had sought only declaratory and injunctive relief, rather than just compensation, only because no statute authorized them to sue the United States for just compensation (Pet. App. 40a-44a). See Act of March 3, 1863, ch. 92, 12 Stat. 765, 767; H.R. Rep. No. 1466, 79th Cong., 1st Sess. 2 (1945); Hoyt, *Jurisdiction of the Court of Claims*, 115 Ct. Cl. xxi, xxvii (1950). While the Sioux and certain other tribes were at times allowed to sue by virtue of special legislation granting jurisdiction over particular claims, it was not until more than 40 years after the decision in *Lone Wolf* that Congress enacted legislation providing more generally for recovery on Indian claims. See Indian Claims Commission Act of 1946, 25 U.S.C. 70 *et seq.*; 28 U.S.C. 1505, as added by Section 89(a) of the Act of May 24, 1949, ch. 139, 63 Stat. 102.

from the date of taking, February 28, 1877 (Pet. App. 2a, 33a, 39a).[39]

A final judgment in the amount of $17,553,484, plus interest at 5% per annum on the sum of $17,103,484 of said amount, was accordingly entered (Pet. App. 73a). The United States now challenges only the award of interest on the ground that no taking occurred.

SUMMARY OF ARGUMENT

The Court long recognized that the Indian tribes have been incapable of prudent management of their communal property, and that the United States must undertake this duty as fee owner of tribal lands and pursuant to its power to deal with Indian affairs. A disposal of tribal property in the discharge of this responsibility to manage the property for the tribe's benefit is an act on behalf of the tribe and, in effect, a disposal by the tribe. A proper exercise of this power is no more a taking than would be a sale by the

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[39] Although the Black Hills portion of the reservation was valued at approximately $17.1 million and at least $43 million had been expended to provide the promised rations (Pet. App. 2a, 13a), Congress specifically provided in 1974 that no offset could be claimed for these expenditures. Indian Claims Commission Act of 1946, Section 2, 25 U.S.C. 70a, as amended by the Act of October 27, 1974, Pub. L. No. 93-494, 88 Stat. 1499. The Court of Claims held, contrary to respondents' contentions, that the 1974 amendatory legislation did not bar judicial consideration of these federal expenditures for purposes of making the threshold determination of whether the Sioux were entitled to recover for a Fifth Amendment taking (Pet. App. 14a-15a n.4).

tribe itself, were it freed from historical disabilities. The Court of Claims was in error in declining to so treat the Act of 1877 by which the Black Hills were severed from the Great Sioux Reservation.

I.

First, the decision below wrongly required of the Congress an affirmative declaration that the undertaking assumed in consideration of the cession of the Black Hills constituted a fair economic equivalent. This reverses the usual presumption: the burden is not on those defending legislation to demonstrate that the power invoked was permissibly exercised. On the contrary, the challenger must show that there was no reasonable basis on which Congress could have concluded that the legislation would benefit the tribe. That is the teaching of *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903), among other precedents.

Here the 1877 Act recited that "in consideration" of the cession of the Black Hills, the United States undertook a number of commitments, including a guarantee of subsistence until the Sioux could support themselves, the grant of 900,000 acres of grazing land, and a plan calculated to lead the Sioux to eventual economic independence (A. 333-334). Although the Act did not say in so many words that the "consideration" was a "fair consideration," that is presumed. At all events, there is ample affirmative evidence that Congress and its various commissions were sensitive to the need to provide a fair economic equivalent. Certainly, there is no basis for con-

cluding that Congress believed the consideration was inadequate.

II.

Moreover, the Court of Claims erred in confining its focus to the issue of economic equivalence. Although that issue is a factor in the final equation, the welfare of the tribe comprehends more than simply strict maintenance of the net worth of tribal property. In 1874-1877 the Sioux Nation was in extremis. It had no viable means of support. The United States was under no obligation to continue providing gratuitous aid. In these urgent circumstances it was only natural for the United States, as guardian for the Sioux, to sell some of its vast land to secure a guaranteed means of support and a plan calculated to lead the Sioux to self-sufficiency. The sale of the Black Hills also solved another crisis facing the Sioux: despite strenuous efforts until November 1875 to prevent their intrusion, miners poured into the area in search of gold, thus destroying the Sioux's quiet enjoyment of the Black Hills. In these circumstances, it was entirely reasonable for the United States, in the interest of the tribe, to solve both crises facing the Sioux by exchanging the Black Hills for the vital undertakings provided by the 1877 Act. In these circumstances, and in light of the fact that the consideration exchanged was of substantial and obviously not disproportionate value to the Black Hills, Congress acted prudently in not postponing relief until more precise appraisals than already existed could be made.

ARGUMENT

There is much common ground among the parties and the Court of Claims. All agree that—quite apart from the sovereign prerogative of eminent domain—Congress has plenary power to manage and to dispose of tribal land when it is acting to promote the welfare of the tribe (Pet. App. 9a-10a).[40] All agree that in exercising that power Cogress may unilaterally abrogate a prior Indian treaty with superseding legislation (*id.* at 29a-30a, 32a).[41] And all agree that, in some circumstances, governmental appropriation of tribal property can amount to a "taking" within the Fifth Amendment, giving rise to a claim for just compensation, including interest (*ibid.*).[42] What is at issue is what those circumstances are.

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[40] See, *e.g.*, *Roff* v. *Burney*, 168 U.S. 218 (1897); *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 306 (1902); *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565 (1903); *Sizemore* v. *Brady*, 235 U.S. 441, 449 (1914); *Nadeau* v. *Union Pacific R.R.*, 253 U.S. 442, 443-446 (1920); *Morrison* v. *Work*, 266 U.S. 481, 485 (1925). Likewise, Congress has plenary power over the use and distribution of tribal proceeds from the sale of lands and other tribal assets. *United States* v. *Kagama*, 118 U.S. 375, 379-380 (1886); *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73, 84-85 (1977) (and cases cited therein).

[41] "A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty." *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1871).

[42] *E.g.*, *United States* v. *Klamath Indians*, 304 U.S. 119, 123-125 (1938).

The court below held that whenever Congress deprives an Indian tribe of its land without affirmatively indicating that the exchanged assets are of equivalent value, a Fifth Amendment "taking" has occurred —irrespective of whether the transaction otherwise serves the interests of the tribe. We believe this approach is erroneous because (i) it reverses the usual presumption that Congress is permissibly exercising the constitutional power invoked, and (ii) it too narrowly defines the power of Congress to manage tribal affairs. In our view, the true rule is that Congress must be assumed to be acting within its plenary power to manage tribal assets if it reasonably can be concluded that the legislation was intended to promote the welfare of the tribe.

I. An Exercise Of Congress' Plenary Power To Manage And To Dispose Of Tribal Lands Is Presumptively Valid And Must Be Sustained So Long As It May Reasonably Be Deemed Beneficial To The Welfare Of The Tribe

The basic error of the Court of Claims, in our view, was in reversing the usual presumption and requiring the United States to assume the burden of demonstrating that the 1877 Act does not overstep the bounds of congressional power over Indian affairs. The correct approach, we submit, when an exercise of Congress' plenary power to manage and to dispose of tribal property is challenged, is to sustain the legislation so long as it may reasonably be deemed beneficial to the welfare of the tribe. A number of considerations compel this standard of judicial review.

A. As early as 1890, the Court recognized that when tribal lands are taken by the United States pursuant to its power of eminent domain, just compensation must be paid. *Cherokee Nation* v. *Kansas Ry.*, 135 U.S. 641, 657, 659 (1890).[43] The Court, however, has consistently sustained every purported exercise of the power to control tribal property which could reasonably be said to benefit the tribe against tribal challenges that they were takings of property under the Fifth Amendment. Conversely, the only appropriations of Indian land held by this Court to be takings have been those in which, indulging all reasonable doubts in its favor, Congress could not be supposed to have been attempting to benefit the tribe.

In two leading cases the Court held that legislation disposing of tribal property for the benefit of the tribe (but over its objection) did not constitute a taking under the Fifth Amendment. *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 307 (1902);[44] *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 564, 567-568 (1903). For

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[43] Even before 1890, the obligation to pay just compensation to tribes for the taking of tribal property by eminent domain was recognized in certain treaties. See, *e.g.*, Treaty of June 5, 1854, Miamis, Art. 10, 10 Stat. 1093, 1097.

[44] In *Cherokee Nation*, Congress authorized the Secretary of the Interior to sell the rights to extract oil from tribal lands and to use the proceeds to the benefit of the tribe. After holding that this was a valid exercise of the plenary power, the Court stated "[t]here is no question involved in this case as to the taking of property" because the legislation "has relation merely to the control and development of the tribal property." 187 U.S. at 307-308.

example, in *Lone Wolf*, as here, Congress passed legislation that disposed of tribal lands without complying with a treaty provision requiring consent of three-fourths of all adult male Indians on the reservation. The tribe filed a bill in equity to enjoin the disposal on the ground that the "interest of the Indians in the common lands fell within the protection of the Fifth Amendment to the Constitution." *Id.* at 564. Although recognizing the tribal right of occupancy to be as "sacred as the fee," the Court rejected the challenge because "Congress possess[es] a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests." *Id.* at 564, 565.[45] A purported exercise by Con-

[45] The majority of the Court of Claims concluded that *Lone Wolf* neither reached nor decided the issue of whether the act in question would constitute a Fifth Amendment taking for which just compensation was due (Pet. App. 30a). Stressing that the Indians in *Lone Wolf*, lacking a legal remedy due to the government's sovereign immunity, had sued in equity for injunctive relief, the court reasoned (*id.* at 30a-31a) that this Court decided only the unavailability of equitable relief. This, as Judge Nichols explained below in his concurrence (Pet. App. 39a-45a), misreads *Lone Wolf*. As the Court of Claims itself pointed out, the Indians in *Lone Wolf* "were arguing that the Court should prevent actions which, [they] believed, would result in an unconstitutional taking *if* not promptly enjoined" (Pet. App. 31a n.6) (emphasis in original). Since the Indians then had no remedy at law to obtain just compensation, this Court in *Lone Wolf* necessarily had to conclude that the challenged statute would work no unconstitutional taking, else an injunction would have issued. See *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110, 113-114 (1919), where this Court not only cited *Lone Wolf* to sustain the capacity of the Indians to sue to enjoin disposal of lands

gress of its plenary power to manage tribal assets for the benefit of the tribe, the Court held, is "presumed" to be properly exercised for the welfare of the dependent tribe. *Id.* at 566. "We must presume," said the Court, "that Congress acted in perfect good faith in [its] dealings with the Indians [and] that the legislative branch of the government exercised its best judgment in the premises." *Id.* at 568.[46]

This is not to say that the presumption will not yield to overwhelming evidence that Congress was not acting as a bona fide guardian. But, in all of the

allegedly theirs as public lands of the United States, but directed that disposal be enjoined pending trial and decision on the merits. As Judge Nichols stated (Pet. App. 43a), "*Lone Wolf* is purely and simply a holding that the fifth amendment does not require just compensation to the Indians in the situation then before the Court." This was the basis of the Court of Claims' 1942 decision of this very claim (A. 245-247), and unquestioned by that court until the decision below. See *Three Tribes of Fort Berthold* v. *United States*, 390 F.2d 686, 691 (Ct. Cl. 1968).

The Indian plaintiffs in *Lone Wolf* subsequently brought suit under the Indian Claims Commission Act of 1946, in which the Commission found a fair market value much greater than the compensation allowed under the challenged statute. The Commission allowed a recovery for the net deficiency, without interest. See *Kiowa, Comanche and Apache Tribes* v. *United States*, 4 Ind. Cl. Comm. 95 (1955), aff'd, 163 F. Supp. 603 (Ct. Cl. 1958), cert. denied, 359 U.S. 934 (1959).

[46] In *Lone Wolf*, the Court stated that the management and disposal of tribal lands was a political question not subject to judicial review at all. 187 U.S. at 565. That strict rule has been relaxed in recent years to allow review under the Fifth Amendment rational-basis test. See *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73, 84-85 (1977).

later decisions of this Court awarding just compensation (including interest from the date of the taking), or granting injunctive relief, there could be no colorable claim that the action taken was intended to promote the welfare of the tribe. Indeed, the only such cases involved situations in which the government either treated Indian lands as public lands and sought to sell them as such, *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1919) (injunction); *Yankton Sioux Tribe* v. *United States*, 272 U.S. 351 (1926) (compensation);[47] *United States* v. *Klamath & Moadoc Tribes*, 304 U.S. 119, 125 (1938) (compensation),[48] accidently included tribal lands in patents to settlers, railroads and others, *United States* v. *Creek Nation*, 295 U.S. 103, 109-110 (1935) (compensation), diluted the value of the tribal right

[47] The opinion of the Court in *Yankton Sioux* is silent with respect to interest, but the decision and judgment on remand included interest from the date of the taking. 65 Ct. Cl. 427, 431 (1928).

[48] The Court of Claims observed (Pet. App. 32a n.7) that in *Klamath & Moadoc Tribes* the United States paid $108,750 for the land taken "in related parts of a single transaction." This is not really so. In 1864 the United States gave Oregon certain odd-numbered sections on each side of a proposed road without realizing that certain parcels were lands purportedly allotted to tribal members by a treaty made shortly thereafter. The United States sued to recover the allotted lands but lost. *United States* v. *California & Oregon Land Co.*, 148 U.S. 31 (1893), additional opinion on further proceedings, 192 U.S. 355 (1904). In 1906, Congress authorized the Secretary of the Interior to exchange unallotted lands in the reservation (belonging to the tribe) for the allotted lands earlier conveyed to Oregon. The Secretary later made an agreement with the

of exclusive occupancy by moving other tribes onto the reservation, *Shoshone Tribe* v. *United States*, 299 U.S. 476, 496 (1937) (compensation), or simply established a national forest in tribal lands without any compensation, *Chippewa Indians* v. *United States*, 305 U.S. 479, 481-482 (1939). In each instance, it was clear that under no rational theory could the action be viewed as anything other than "an act of confiscation." *Lane* v. *Pueblo of Santa Rosa*, *supra*, 249 U.S. at 113.

B. Although the Court has not had an occasion since *Lone Wolf* to consider the appropriate standard of review of congressional decisions to sell Indian lands, the Court's pronouncements in related areas

owner of the allotted lands pursuant to which the allotted lands were reconveyed to the United States (to be reconveyed to the individual tribal members to whom they had ostensibly been allotted) in exchange for 87,000 acres of unallotted lands on the reservation (which had belonged to the tribe). "That transfer [of 87,000 acres] was made without the knowledge or consent of [the tribe] and without giving them any compensation for the lands so taken from their reservation." *Klamath Indians* v. *United States*, 296 U.S. 244, 248 (1935). Two years later, Congress appropriated $108,750 for the tribe on condition that the tribe execute a release for the taking of the 87,000 acres, and in 1909 the release was provided. When the tribe later sued for just compensation, the release was held a valid bar to recovery. *Id.* at 255. Congress then authorized recovery without regard to the release. *United States* v. *Klamath & Moadoc Tribes*, 304 U.S. 119, 125 (1938). Thus, when the 87,000 acres was taken from the tribe, no undertaking was provided to pay any sum of compensation. And, more importantly, the obvious purpose of the transaction was to benefit the individual owners of the allotments and not the tribe. Thus, there was no purported attempt to manage the tribal land for the better welfare of the tribe.

confirm that the appropriate standard of review is the rational-basis test. Reviewing these decisions in *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73, 84-85 (1977), the Court observed that "[t]he general rule emerging from our decisions ordinarily requires the judiciary to defer to congressional determination of what is the best or most efficient use for which tribal [assets] should be employed." The appropriate "standard of review" is that "the legislative judgment should not be disturbed" so long as " 'the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians * * *'," *id.* at 85, quoting *Morton* v. *Mancari*, 417 U.S. 535, 555 (1974). This is the same rule announced some sixty years before in *Perrin* v. *United States*, 232 U.S. 478, 486 (1914):

> As the power is incident only to the presence of the Indians and their status as wards of the Government, it must be conceded that [the plenary power] does not go beyond what is reasonably essential to their protection, and that, to be effective, its exercise must not be purely arbitrary, but founded upon some reasonable basis. * * * On the other hand, it must also be conceded that, in determining what is reasonably essential to the protection of the Indians, Congress is invested with a wide discretion, and its action, unless purely arbitrary, must be accepted and given full effect by the courts.

Accord: *United States* v. *Kagama*, 118 U.S. 375 (1886); *Wallace* v. *Adams*, 204 U.S. 415, 423 (1907); *Gritts* v. *Fisher*, 224 U.S. 640, 642-643 (1912).[49]

Although these decisions involved Fifth Amendment challenges to statutes based on parallel aspects of Congress' plenary power over tribal property (such as devising schemes for distribution to tribal members of tribal assets), there is no principled basis for disregarding them in our very analogous context, and respondents so concede.[50]

C. In considering the applicable standard of judicial review here, it is important to distinguish those situations in which Congress has expressly created a statutory right of recovery (without interest) based on traditional equitable principles for mismanagement of tribal assets. Just as Congress authorized the Indian Claims Commission to award equitable recovery (without interest) for cessions of tribal land for which inadequate consideration was given (see page 42, *supra*), Congress for many years prior to the Indian Claims Commission Act enacted

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[49] This standard of review is, moreover, consistent with the traditional, rational-basis standard of review applied to determine the validity, against due process challenges, of legislation enacted for the general social welfare of the public. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 491 (1955).

[50] Significantly, even respondents agree (Br. in Opp. 8-9 n.6) that the appropriate standard of judicial review in our case is, as *Weeks* and *Mancari* prescribe, whether it can be " 'tied rationally to the fulfillment of Congress' unique obligation toward the Indians * * *'," citing *Mancari* (417 U.S. at 555).

special jurisdictional statutes authorizing equitable recovery against the United States for losses suffered by the tribes due to action by the United States. In such cases, the Court has often applied a more exacting standard of review.

For example, in *Seminole Nation* v. *United States*, 316 U.S. 286, 295 (1942), the jurisdictional statute authorized the Court of Claims to adjudicate "all legal and equitable claims" arising under treaty or statute. Accordingly, the Court applied "a well established principle of equity" to hold that, by paying money to a fiduciary of the tribe (the Seminole General Council) for the purported benefit of the tribe, with knowledge that the fiduciary intended to misappropriate it, the United States was "a participant in the breach of trust and liable therefor to the beneficiary." *Id.* at 296. The Court deemed it appropriate to apply "the most exacting fiduciary standards" (*id.* at 297) because of the obligation of trust incumbent upon the government in dealing with Indians and, as mentioned, because the jurisdictional statute permitted application of traditional equitable principles.[51] Similarly, in *United States* v. *Mason*, 412 U.S. 391 (1973), an Indian allotment act had specifically provided that the proceeds from the sale of land would be held "in trust" by the United States for the benefit of individual tribal members. A tribal member sued

[51] In *Seminole Nation*, the Court relied upon general state law applicable to fiduciaries and the *Restatement of the Law of Trusts* (1935). 316 U.S. at 296-297 & n.12.

the United States under 28 U.S.C. 1491 for breach of "its fiduciary duty" in making allegedly unnecessary state tax payments from the fund. The court noted that "the scope of the United States' fiduciary duty in administering * * * trust property is a question of federal [common] law." 412 U.S. at 397 n.9, citing *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943).

Significantly, these cases of equitable recovery and many like examples [52] do not purport to find "takings" under the Fifth Amendment and they do not purport to award "just compensation" or interest as a component thereof.[53] The stricter standard of review

[52] *Menominee Tribe* v. *United States*, 101 Ct. Cl. 10 (1944); *Kiowa, Comanche and Apache Tribes* v. *United States*, 4 Ind. Cl. Comm. 95 (1955), aff'd, 163 F. Supp. 603 (Ct. Cl. 1958), cert. denied, 359 U.S. 934 (1959); *United States* v. *Mescalero Apache Tribe*, 518 F.2d 1309 (Ct. Cl. 1975) cert. denied, 425 U.S. 911 (1976). See generally *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 282-285 (1955); *Blackfeather* v. *United States*, 190 U.S. 368, 376 (1903).

[53] In some instances, the challenged action would appear to have been improper under any standard of review. For example, in *United States* v. *Mille Lac Chippewas*, 229 U.S. 498 (1913), Congress did not even purport to dispose of the tribal land pursuant to its plenary power. The Secretary of Interior had simply sold tribal land to the public under the general land laws. Unlike *Lone Wolf* and *Cherokee Nation*, in *Mille Lac Chippewas*, the sale was "not adopted in the exercise of the administrative power of Congress over the property and affairs of dependent Indian wards" but was an assertion of an "unqualified power of disposal over the lands as the absolute property of the Government." 229 U.S. at 510. Sovereign immunity had been waived by a special jurisdictional act con-

applied there is not, therefore, applicable where the issue is—not recovery of damages alone under a common law or statutory right of action—but a claim for just compensation, including interest, based on the Constitution.[54]

To be sure, the present case arises under special legislation which, exceptionally, forbids any deduction for gratuitous offsets, and therefore permits an award of some $17.5 million. But Congress did not purport to enact special rules to control the interest question. As to that, the 1978 Act (Pet. App. 4a) simply instructed the Court of Claims to determine whether the legislation of a century earlier had "effected a taking of the Black Hills portion of the Great Sioux Reservation in violation of the fifth amend-

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ferring jurisdiction in the Court of Claims to hear and determine the claim. Act of February 15, 1909, ch. 126, 35 Stat. 619. The court's decision appears to rest on equitable grounds but is also fully consistent with its later decisions holding treatment of Indian lands as public lands "confiscation."

[54] The extent to which trust law applicable to private trustees may be imported into the relationship between the United States and Indian tribes where equitable actions for recovery of damages (without interest) are authorized against the United States, as for example, where the United States is by statute required to hold Indian funds in interest-bearing trust accounts, is unsettled. Compare *Gila River Pima-Maricopa Indian Community* v. *United States*, 140 F. Supp. 776, 780-781 (Ct. Cl. 1956) (trust relationship must be defined by a treaty, agreement, regulation, statute or order), with *Manchester Band of Pomo Indians, Inc.* v. *United States*, 363 F. Supp. 1238 (N.D. Cal. 1973) (holding applicable the common law duty to make trust productive and the prudent-man rule to United States as trustee under statute). See Note, *Indian Tribal Trust Funds*, 27 Hastings L.J. 519 (1975).

ment." For that purpose, then, the usual standard of judicial review controls.

D. The correct result in the present case is not in doubt if we indulge the applicable presumption of good faith due the Congress of 1877 and ask ourselves whether there is a rational basis for viewing its action as intended to benefit the tribe. In a moment, we shall consider the other, wholly proper, considerations that apparently informed the congressional decision. But even if we look only to monetary equivalence, there is no cause for impugning the Act of 1877.

It is true that Congress made no explicit finding that the undertakings given—in respect of rations and other material assistance—were of equal value to the Black Hills. Yet, the 1877 Act expressly recites that the obligations were assumed "in consideration" of the ceded lands (A. 333). In the absence of compelling evidence to the contrary, we must assume Congress deemed the undertaking a *fair* consideration—as, indeed, experience demonstrated. Bad faith cannot be imputed to the legislators merely because they failed to say, in so many words, that they believed they were paying a fair equivalent.

A reviewing court might well stop here. But if it delved further, the evidence corroborates the congressional intent to act in the interest of the tribe. Although no dollar figures were given as to the value of the considerations exchanged, the record does demonstrate that the United States was sensitive to the

need to give the Sioux a just equivalent for the Black Hills.

In 1875 President Grant directed a survey of the Black Hills "[i]n order to provide for the question of a fair equivalent" (A. 27, 151). While the Jenney report did not place a value on the Black Hills, it did describe the area in detail and the report was supplied to Congress in 1876 at its request. S. Exec. Doc. No. 51, 44th Cong., 1st Sess. (1876). In 1875, the President stated personally to a delegation of Sioux chiefs that he regarded it as "very important" that the Sioux "receive a full equivalent" for the Black Hills (A. 213-215). In 1875 the Commissioner of Indian Affairs called for legislation much like the 1877 Act to solve the Black Hills controversy "offering a fair and full equivalent for the [Black Hills]" (A. 29-30, 151). After unsuccessfully negotiating for a sale to the United States of the Black Hills in 1875, Senator Allison in 1876 called for legislation that would "give [the Sioux] a proper equivalent for the use and occupation of the Hills by the whites" (see page 24, *supra*). Pursuant to the 1876 Act, the Manypenny commission obtained the agreement of head-men and chiefs who spoke at the numerous negotiating sessions held in September-October 1876. In a report quite solicitous of the Sioux, the commission recommended numerous measures to correct past injustices to the Sioux, including the payment of "full value" for property (horses and arms) that had been wrongfully taken from certain tribal members during the Sioux War (A. 118). There was no suggestion

that the commission felt the 1876 agreement was unfair. To the contrary, the commission expressed confidence (A. 120):

> that this agreement contains provisions which, if faithfully carried out, will save these Indians and redress some of the wrongs which furnish the darkest page of our history.

These statements demonstrate that Congress did not ignore the issue of fair economic equivalence.

Finally, the ultimate economic value to the Sioux of the provisions supplied under the Act was $43 million or more, not to mention the value of the 900,000 acres of grazing land added to the reservation. The Black Hills area was eventually found to be worth only $17.1 million. Although the Court of Claims dismissed this one-sided exchange with the observation that "[t]here is no reason to believe that Congress anticipated" that it would be required to purchase rations in such amounts (Pet. App. 27a), the converse would seem to be a more compelling proposition. The actual expenditures under the Act are at least some proof of what was probably expected at the time of the undertaking.

The Court of Claims suggested (Pet. App. 27a) that Congress really believed the commitment would expire in less than ten years because Senator Allison's bill, S. 590—which was not enacted—would have provided rations for no more than ten years in exchange for the Black Hills. Evidently, the court felt that by projecting an annual subsistence appropriation of $1 million annually over ten years, the eco-

nomic benefit to one tribe would have been $10 million, less than the value of $17.1 million eventually attributed to the Black Hills.

There are two serious errors in this suggestion. Even on its face, the outright sale of the Black Hills for $10 million in rations would not have been unreasonable in light of the fact that the Black Hills were incapable of accurate appraisal (due to the impracticality of estimating the quantity of gold in the Black Hills). Furthermore, the deletion of the ten-year limitation from the final enactment, rather than demonstrating an assumption that the Sioux would be self-sufficient within a decade, suggests that Congress believed the Sioux would require more than a decade to achieve economic independence. And, the Allison commission, which originally proposed legislation such as the 1877 Act, contemplated a long-term commitment of education, labor, and assistance (see pages 22-23, *supra*).[55]

In sum, the evidence of record supports the conclusion that the Congress of 1877 meant to give fair value for the Black Hills. Certainly, when we accord

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[55] In his annual report for 1875, the Commissioner of Indian Affairs stated that subsistence appropriations at the rate of $1.1 million would be necessary "for some years to come" (A. 230). The Allison commission predicted that rations would have to be provided for 50 years or more unless its proposal for education, labor and aid was adopted (A. 183). Senator Allison, moreover, stated in introducing S. 590 that "every Senator who has investigated the question knows perfectly well that these Indians cannot become self-supporting where they now are in any reasonable time" (4 Cong. Rec. 1798 (1876)).

to the legislation the presumption of good faith which is due, it is not possible to say that Congress was knowingly cheating the Sioux. It follows that, even if we confine the focus to the question of monetary equivalence, the Act of 1877 must be viewed as a reasonable exercise of the federal power to manage tribal property, and not a "taking" without just compensation.

II. Management Of Tribal Property For The Promotion Of The Welfare Of The Tribe Requires Consideration Of Aspects Of Indian Welfare Other Than Simply The Conservation Of The Net Value Of Tribal Property

We believe the decision below fails on its terms—looking only to immediate monetary equivalence—if we give to congressional action the benefit of the usual presumptions. But, in any event, we submit the Court of Claims wrongly confined its focus to the question whether the undertakings substituted for the Black Hills amounted to an economic equivalent—without considering whether other circumstances in 1875-1877 might have warranted the conclusion that the welfare of the Sioux was promoted by the 1877 Act. As we suggest in due course (see pages 71-75, *infra*), a different result would have been compelled if the court had taken into account—as we believe it was required to do—the failure of the Sioux to achieve self-sufficiency, their lack of any food supply, and the threat to peace and tribal property posed by the discovery of gold in the Black Hills.

A. From the earliest days, this Court has repeatedly recognized that the Indian tribes were incapable

of prudent management of their communal property and that the United States, as the fee owner of the land, necessarily must undertake this responsibility on behalf of the tribe.[56] Whatever revision of that doctrine may be appropriate in the somewhat changed circumstances prevailing today, it reflected the real situation a century ago when the transaction in suit occurred. As the Court explained in *Board of County Commissioners* v. *Seber*, 318 U.S. 705, 715 (1943):

> In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic.

Thus, "as regards tribal property subject to the control of the United States as guardian of Indians, Congress may make such changes in the management and disposition as it deems necessary to promote their welfare." *Morrison* v. *Work*, 266 U.S. 481, 485

[56] The trust concept of the United States as guardian and the Indian tribes as wards has an ancient lineage that dates from the earliest treaties with Indian tribes in which the United States received the Indians "into their protection." *E.g.*, Treaty of October 22, 1784, 7 Stat. 15; see F. Cohen, *Handbook of Federal Indian Law* 48 (1942) ("Cohen").

(1925). This power to protect the "remnants of a race once powerful, now weak and diminished in numbers" must "exist in that [general] government, because it never has existed anywhere else." *United States* v. *Kagama*, 118 U.S. 375, 384 (1886). F. Cohen, *Handbook of Federal Indian Law* 94-98 (1942).

When Congress acts under its power to manage Indian lands for their protection and welfare, it is, in a very real sense, acting on behalf of the tribe and, in effect, the disposition of property is by the tribe itself. Although the analogy is not exact,[57] the

[57] As Felix Cohen explained, the guardian-ward concept has been used in Indian cases in at least ten different ways. Cohen, *supra*, at 169-173. The relationship of guardian and ward, however, as it is known at common law, "does not exist between the United States and the Indians, although there are important similarities and suggestive parallels between the two relationships." *Id.* at 169.

To take only two examples, although under traditional trust principles a trustee may not represent conflicting interests, the United States has, by necessity, represented both the tribes and the public interest in the various allotment acts authorizing the sale on behalf of the tribe of unalloted tribal lands to the general public. See, *e.g.*, the General Allotment Act, ch. 119, 24 Stat. 388. To be sure, a goal of the allotment acts was to assist individual tribe members by providing them with land allotments for farming and a share of the funds received from the sale of unalloted tribal lands. But another interest was that of the "familiar forces" who sought to "open" the unallotted areas to settlement. See *DeCoteau* v. *District County Court*, 420 U.S. 425, 431 (1975); *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 590 (1977). The validity of these acts under the Fifth Amendment is nevertheless beyond question. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903). So, also, Congress has on occasion waived the sovereign immunity of a tribe and subjected it to suit under special jurisdictional acts to allow certain claims to be heard against

disposition is analogous to an action by a guardian on behalf of its ward: the transaction is deemed to be made by and for the ward even though the power to effect it resides in the guardian. A valid exercise of the power, therefore, is no more a taking than would be a sale by the tribe itself, freed from the disabilities imposed by history.

Without carrying it to its logical conclusion, the Court of Claims accepted this analysis in part. The court recognized (Pet. App. 11a) that dispositions of Indian land by the national sovereign must be deemed to be made on behalf of the tribe and that no taking occurs "as long as [the United States] fairly (or in good faith) attempts to provide [its] ward with property of equivalent value." The court also agreed that hindsight does not control. Even if it later transpires that the tribe suffered an economic loss, the transaction is not deemed a taking so long

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the tribe. Even though the tribe is also the ward of the United States, such statutes do not violate the trust responsibility of the United States or the Fifth Amendment. *Winton* v. *Amos*, 255 U.S. 373, 392 (1921). Similarly, in the present case, it is obvious that the miners and other settlers who wanted to "open" the Black Hills represented an interest in conflict with the interest of the Sioux. This circumstance, however, does not defeat an otherwise valid exercise of Congress' plenary power to manage Indian lands for their benefit or render it a taking under the Fifth Amendment. Otherwise, given the competing interests Congress may also represent, virtually no disposition by Congress of tribal lands would be valid. Rather, the duty is for Congress to insure that its action on their behalf promotes the welfare of the tribe, even if it also benefits non-Indian interests. *Sioux Tribe* v. *United States*, 146 F. Supp. 229, 235 (Ct. Cl. 1956).

as there was, at the time, a good faith attempt to achieve economic equivalence (*ibid.*). But the court declined to go further and recognize that the welfare of the tribe may, on occasion, require consideration of a broad complex of factors beyond economic equivalence.

The rule adopted by the court below would confine the guardianship role of the government to that of a very conservative land manager. Normally, disposition of tribal lands would be forbidden, since their net worth could ordinarily be conserved simply by holding the property intact. Yet, the general welfare of the tribe is the preeminent consideration, not simply the net worth of the tribe. There are times—or, at least, there were a century ago—when the more fundamental interests of a tribe, the need to chart a course calculated to lead to the tribe's self-sufficiency, or even its survival as a community, necessarily eclipsed extended debate about the relative economic values. In such cases, the plenary power of Congress permits it to manage tribal property as "necessary to promote [tribal] welfare," and Congress need not insist on prior proof of precise economic equivalence before responding on behalf of the tribe to meet such emergencies.

B. When we apply these principles to the transaction involving the Black Hills, it is clear that the Congress of 1877 was properly exercising its broad powers as guardian of the Sioux Nation. Viewed in the light of the severe emergency circumstances facing the Sioux in 1874-1877, the 1877 Act is readily

understood as a measure designed to promote the welfare of the Sioux Tribe.

The Sioux had not, contrary to expectations, achieved self-sufficiency. The Sioux on the reservation remained dependent, to a large extent, on provisions supplied by the United States. The duty under the treaty of the United States to supply such provisions (pursuant to which the United States spent over $5 million) had expired on June 30, 1874. From that date until passage of the 1877 Act, the Sioux Nation had no viable means of support. Although the United States gratuitously appropriated over $1.1 million annually from 1874 until the 1877 Act, it did so without any obligation. In these dismal circumstances, it was of the utmost importance to the welfare of the Sioux Nation that it secure not only immediate relief but also a long-term plan calculated to achieve their self-sufficiency. The 1877 Act provided precisely such a plan, not simply by guaranteeing provisions so long as needed, but by conditioning individual benefits on efforts to educate children and to undertake work calculated eventually to instill skills that would lead to economic independence (see pages 22, 23, 34, *supra*).

Even in the absence of the Black Hills controversy, the disposition of tribal land in exchange for such a plan would have been prudent and in the best interests of the Sioux. In the face of the Black Hills problem, the 1877 Act was all the more imperative. The Army's best efforts for eight years had failed to keep whites out of the goldfields in the Black Hills. The

Sioux themselves were incapable of peacefully dissuading the miners who wrongfully invaded the Black Hills in search of gold. Although they might have resorted to hostilities against the miners to preserve the Black Hills, such a course would have taken its own toll in blood on the tribe. And, in the end, it is problematical whether tribal policing efforts against the miners would have been any more successful than the "very stringent," but ultimately futile, efforts of the Army from 1868 to 1875. In the final analysis, Congress recognized that, despite military efforts by the government, the quiet enjoyment of the Black Hills by the Sioux was impossible due to actions beyond the effective control of the United States or the Sioux. Congress was entitled to conclude that both crises facing the Sioux would best be solved and the welfare of the Sioux best promoted by the cession of the Black Hills to the United States in exchange for a long-term commitment to supply food and a plan calculated to lead to economic independence (and 900,000 acres of additional land).

If the promise to supply continuous provisions for as long as needed (plus 900,000 acres of land)[58] had been of obviously disproportionate value to the Sioux, or if the difficulties facing the Sioux had not reached the boiling point, or if other solutions had

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[58] As noted by the court below (Pet. App. 13a n.3), we do not contend that the 900,000 acres of grazing land by itself constituted a "significant element of the consideration," at least as to its value in dollars as compared to the over seven million acres in the Black Hills. But we do contend that its value must be considered.

convincingly presented themselves, Congress might have felt free to give more deliberate consideration to the relative economic values of the considerations exchanged. More surveys and appraisals might have been made of the Black Hills. The projected value to the tribe of the plan established by the 1877 Act to achieve economic independence might have been approximated. But those were not the circumstances. In light of the fact that the crisis demanded an immediate response, it was plain enough that the value of the promise to supply provisions until achievement of self-sufficiency, while of uncertain monetary value, was of enormous practical importance to the survival of the tribe and appeared to be of sufficient duration as to entail a substantial outlay of money over the decades to come. In this situation, it was entirely reasonable to go forward with a solution rather than to remain paralyzed while appraisals of the values of the Black Hills and the governments' undertaking were made.

When all the aspects of the crisis facing the Sioux Nation in 1875-1877 are viewed together, as they appeared at the time, it is plain that Congress rationally could have concluded that the 1877 legislation promoted the welfare of the tribe. Accordingly, the Court of Claims erred in refusing to sustain the 1877 Act as a constitutional exercise of congressional power over Indian affairs.[59]

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[59] It is largely immaterial (a) that only 10% or less of the total tribal members signed the 1876 agreement, or (b) that Congress made known its intention to refuse after July 1, 1877, to make further gratuitous subsistence appropriations for the Sioux in order to induce the Sioux to accept an agreement Congress felt would promote their welfare. These facts would have become relevant had a purported three-fourths agreement been the basis for the cession. It was not, however. Although Congress was entitled to try to secure by consent what it thought best for the tribe, failing that, or even in the absence of such an effort, Congress was fully empowered to exercise its plenary power to control Indian lands and to do so in derogation of the 1868 treaty without obtaining the tribe's agreement (see pages 51-52, *supra*).

CONCLUSION

The judgment of the Court of Claims should be reversed insofar as it holds the United States liable for a Fifth Amendment taking of the Black Hills and the judgment against the United States should be reduced to $17,553,484.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

WILLIAM ALSUP
Assistant to the Solicitor General

DIRK D. SNEL
MARTIN W. MATZEN
Attorneys

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